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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS ARTURO PRECIADO,

Defendant and Appellant.

E071391

(Super.Ct.No. PEF001763)

OPINION

APPEAL from the Superior Court of Riverside County. L. Jackson Lucky IV,
Judge. Affirmed.

Luis Arturo Preciado, in pro. per.; Donna L. Harris, under appointment by the
Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant, Luis Arturo Preciado, filed a motion to dismiss or strike one of his prior strike convictions pursuant to Penal Code section 1385,¹ which the court denied. After defendant filed a notice of appeal, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case and identifying two potentially arguable issues: (1) whether the trial court erred in denying defendant's motion to dismiss or strike a prior conviction; and (2) whether the court's order denying defendant's motion to dismiss or strike a prior conviction was an appealable order.

Defendant was offered the opportunity to file a personal supplemental brief, which he has done. Defendant contends not that the court erred in denying the motion from which he appeals, but that the trial court, in November 1999 and January 2000, respectively, erred in finding true and imposing sentence on the section 667, subdivision (a) prior serious felony conviction allegations and erred in imposing the upper term on the firearm enhancement. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND²

After defendant pled guilty to being an ex-felon in possession of a firearm, a jury convicted him of attempted robbery, attempted murder, and interfering with an executive officer in the performance of the officer's duty. In addition, the jury returned true

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² We take judicial notice of the record in defendant's appeal of the judgment in this case, case No. E026401. (Evid. Code, § 459.)

findings on the special allegations that in the commission of those crimes defendant personally used a firearm. In a separate proceeding, the trial court found true allegations defendant had suffered convictions for two prior serious or violent felonies and two prior strike convictions.

Defense counsel filed a motion on December 23, 1999, to dismiss defendant's prior strike conviction enhancements, which the court denied. The court sentenced defendant to a total determinate term of 15 years followed by an indeterminate term of 25 years to life in state prison.

On appeal from the conviction, defendant raised three issues: (1) whether the evidence was insufficient to support the verdict on interfering with an executive officer; (2) whether the court should have stayed sentence on all counts except the attempted robbery offense pursuant to section 654; and (3) whether the court erred in imposing a \$5,000 restitution fine. We affirmed the judgment.

On August 24, 2018, defendant filed a motion to dismiss or strike one of his prior strike convictions pursuant to section 1385. In support of his motion, defendant argued his strikes were remote, 24 years old;³ the offenses were nonviolent pursuant to section 1192.7⁴ as compared to his strike offenses which were violent offenses;⁵ he attempted to

³ The prior strike convictions were 24 years old on the date he filed the instant motion to strike them; they were less than five years old on the date of his conviction, November 17, 1999, defendant having been convicted of them on April 19, 1995.

⁴ Section 1192.7 enumerates only serious felonies, not violent felonies.

resolve the case without going to trial; was not on probation at the time he committed the offenses;⁶ he had no juvenile criminal history; striking the strike priors would still require that he spend 28 years in prison; and defendant was under the influence of alcohol when he committed the offenses. The court denied defendant's motion, noting that Proposition 57 did "not give resentencing relief. *People v. Dynes* [(2018) 20 Cal.App.5th 523]." ⁷

[footnote continued from previous page]

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⁵ Defendant's offense of attempted murder is deemed a violent felony pursuant to section 667.5, subdivision (c)(12) and because his other offenses were found to have been committed with a firearm, they are also deemed violent offenses pursuant to section 667.5, subdivision (c)(8).

⁶ Defendant was on parole when he committed the offenses.

⁷ Defendant alleged support for his Penal Code section 1385 motion under Proposition 57. Proposition 57 concerns the following: (1) the electorate's judgment that all juvenile offenders be initially charged as juveniles (*People v. Superior Court (Lara)* 4 Cal.5th 299, 303-304 [Proposition 57 applies to all juveniles charged directly in adult court whose judgment was not final at the time it was enacted]; (2) early parole eligibility for defendants convicted of nonviolent felony offense (*In re Edwards* (2018) 26 Cal.App.5th 1181, 1185); and (3) additional custody credits available to defendants who complete certain requirements (*People v. Contreras* (2018) 4 Cal.5th 349, 378; Cal. Code Regs., tit. 15, § 3043 et seq.). Here, (1) defendant neither alleges nor appears to have been either a juvenile at the time he committed the offenses for which he was most recently convicted or when he committed the offenses for which the prior strike and prior serious felony conviction enhancements were based; (2) as discussed in footnote 5, *ante*, defendant is not serving prison time for a nonviolent felony offense; and (3) defendant has not indicated any entitlement to any of the custody credits enumerated in the California Code of Regulations, title 15, section 3043 et seq. Thus, as noted by the court below, Proposition 57 was irrelevant to the proceedings below and is irrelevant to any issues raised on appeal.

II. DISCUSSION

Defendant contends the trial court erred in finding true and imposing sentence on the prior serious felony conviction enhancements and in imposing the “upper” term of 10 years on the personal use of a firearm enhancement. We disagree.

First, the court correctly denied defendant’s motion because it lacked jurisdiction to strike defendant’s strike priors. (*People v. Dynes* (2018) 20 Cal.App.5th 523, 528 [court generally lacks jurisdiction to resentence defendant once execution of sentence has begun]; *People v. Espinoza* (2014) 232 Cal.App.4th Supp. 1, 5-7 [the court lacks jurisdiction to consider a § 1385 motion once the case has become final].) Second, defendant forfeited the issue of whether the court erred in imposing the “upper” term on the firearm enhancement by not raising it below prior to sentencing or in his motion to strike the prior strike convictions. (*People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1511.)

Third, the court did not impose the “upper” term on the firearm enhancements because there is no “upper” term on the enhancement; section 12022.53, subdivision (b) mandates the imposition of a single, 10-year consecutive term when a defendant commits specified offenses while personally armed with firearm. There is no triad of punishment from which the court could have selected an “upper” term on the enhancement.

Fourth, defendant forfeited any issue with respect to the court’s denial of his motion to strike the prior strike convictions or the trial court’s true finding and imposition of sentence on the section 667, subdivision (a) prior serious felony conviction

enhancements by failing to raise those issues in his prior appeal. (See *In re Dixon* (1953) 41 Cal.2d 756, 759 [absent special circumstances, claimed errors which could have been, but were not raised upon a timely appeal from a judgment of conviction are forfeited]; *People v. DeLouize* (2004) 32 Cal.4th 1223, 1232-1233 [the defendant has 60 days from the date of the judgment to file an appeal; failure to file a timely appeal shows acquiescence in the judgment].) Fifth and finally, to the extent defendant's motion was properly made pursuant to Proposition 57, the denial order is not appealable. (*People v. Dynes, supra*, 20 Cal.App.5th at p. 528 [order denying request for resentencing pursuant to Proposition 57 is not appealable].)

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error and find no arguable issues.

III. DISPOSITION

The judgment is affirmed.

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McKINSTER
Acting P. J.

We concur:

SLOUGH
J.

RAPHAEL
J.